

Wati (Migration) [2019] AATA 2631 (30 April 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs Sharita WATI
CASE NUMBER:	1700838
HOME AFFAIRS REFERENCE(S):	BCC2015/1308437
MEMBER:	Mireya Hyland
DATE:	30 April 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl.820.211 of Schedule 2 to the Regulations • cl.820.221(1) of Schedule 2 to the Regulations

Statement made on 30 April 2019 at 1:10pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – insufficient evidence of relationship – strong evidence of relationship – mutual commitment to a shared life together to the exclusion of all others – decision under review remitted

LEGISLATION

*Migration Act 1958 (Cth), ss 5F, 1.15A, 65
Migration Regulations 1994, Schedule 2, cls 820.211(2), 820.221(1)*

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant, Mrs Sharita Wati, a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. Mrs Wati applied for the visa on 5 May 2015 on the basis of her relationship with her sponsor, Ignazio Speciale. At that time, Class UK contained one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The delegate refused to grant the visa on 4 January 2017 on the basis that cl.820.211(2) was not met because there was insufficient evidence to demonstrate that Mrs Wati is the spouse of Mr Speciale.
3. Mrs Wati appeared before the Tribunal on 29 April 2019 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Speciale, as well as Ms Dyezebel Cox and Mr Allan William Lamb. The Tribunal hearing was conducted in English, however, Mr Speciale gave evidence with the assistance of an interpreter in the Italian and English languages. Mrs Wati was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
4. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

5. At the time of the application Mrs Wati was not the holder of a Subclass 771 (Transit) visa and, for the reasons below, she met the requirements of cl.820.211(2) at the time of the application. Therefore, Mrs Wati satisfies cl.820.211(1) of the Regulations.
6. Clause 820.211(2)(a) requires that at the time when the visa application was made the applicant was the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case Mrs Wati claims to be the spouse of Mr Speciale who is an Australian citizen: cl.820.211(2)(a)(i). Also, the sponsor must not be prohibited by cl.820.211(2B) of the Regulations from being a sponsoring partner: cl.820.211(2)(a)(ii). Since he is not a woman who was granted a Subclass 204 (Woman at Risk) visa within the five years immediately preceding the application, Mr Speciale is not prohibited from being a sponsoring partner: cl.820.211(2B)(a).
7. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship, and the nature of their household and commitment to each other: r.1.15A(3). Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered¹ and the Tribunal has considered and satisfied itself about each.

¹*He v MIBP* [2017] FCAFC 206.

8. The Tribunal has viewed Mrs Wati's and Mr Speciale's marriage certificate and finds they were married to each other under a marriage that is valid for the purposes of the Act. They meet s.5F(2)(a).
9. The Tribunal has considered the evidence provided by Mrs Wati and Mr Speciale, including the large number of statutory declarations from friends and family and their consistent evidence at the hearing about their relationship and commitment to each other. It has also considered their written statements, extensive bank documentation over time that reflect their day to day expenditures and support their oral evidence, documents from Family & Community Services confirming their residence, photographs, immigration and travel history, and the evidence from their witnesses, a church friend and a longstanding neighbour, at the hearing, both of whom the Tribunal found persuasive. It finds that the evidence strongly supports that the financial aspects of the relationship, the nature of their household, social aspects of their relationship, nature of their commitment to each other, and all the other circumstances of the relationship demonstrate that they have a genuine and continuing mutual commitment to each other: r.1.15A(3).
10. The Tribunal finds that Mrs Wati and Mr Speciale have a mutual commitment to a shared life together to the exclusion of all others, are in a genuine and continuing relationship, and live together in Green Valley, New South Wales. They, therefore, meet all the requirements in s.5F(2)(b), (c), and (d) of the Act.
11. Given these findings the Tribunal is satisfied that the requirements of s.5F(2) of the Act were met at the time of application. Although some of the matters on which it has relied occurred after that date, it finds they are nonetheless indicative of the couple's relationship on 5 May 2015. Therefore, Mrs Wati was the spouse of Mr Speciale and meets cl.820.211(2)(a) of the Regulations. The Tribunal is satisfied that Mrs Wati was sponsored by Mr Speciale who had turned 18 years of age and so satisfies cl.820.211(2)(c). On 7 April 2015 Mrs Wati was granted a Visitor (Class FA) Subclass 600 visa that ceased on 14 July 2015. Mrs Wati was the holder of a substantive visa on 5 May 2015 and cl.820.211(2)(d) is not engaged.
12. The Tribunal finds that at the time of application Mrs Wati met the requirements in cl.820.211(2) of the Regulations. Since Mrs Wati was the holder of a substantive visa at the time of application and that visa was not a Subclass 300 (Prospective Marriage) visa, cl.820.211(5)-(9) are not relevant to this matter. Likewise, Mrs Wati is not one of the class of persons to whom cl.820.211(2A) applies. Mrs Wati meets cl.820.211 of the Regulations.
13. The Tribunal also finds that at the time of this decision Mrs Wati is the spouse of her sponsoring spouse, Mr Speciale, who is an Australian citizen over the age of 18 and so continues to meet the requirements of cl.820.211(2)(a) and (c) of the Regulations. She, therefore, meets cl.820.221(1) of the Regulations.
14. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

15. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl.820.211 of Schedule 2 to the Regulations
 - cl.820.221(1) of Schedule 2 to the Regulations

Mireya Hyland
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).